IN THE COURT OF APPEALS OF IOWA

No. 9-1039 / 09-0119
Filed January 22, 2010

RANDY JONES,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

Randy Jones appeals from the denial of his second application for postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, John P. Sarcone, County Attorney, and George N. Karnas, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

DOYLE, J.

Randy Jones appeals from the denial of his second application for postconviction relief. He contends his trial counsel breached an essential duty in failing to object to prejudicial evidence, and that his direct appeal counsel, first postconviction relief counsel, and second postconviction relief counsel were ineffective for failing to claim trial counsel was ineffective for that breach. He also contends his trial counsel was ineffective for failing to object to the jury instruction regarding felony-murder, and that his direct appeal counsel and first postconviction relief counsel were ineffective for failing to raise the issue of trial counsel's breach. Additionally, he contends his second postconviction relief counsel was ineffective for failing to argue that the decision in *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006), should apply under the theories of equal protection and separation of powers.[1] In his pro se appellate brief, Jones further argues his state and federal due process rights require retroactive application of *Heemstra* to his case. He also challenges other jury instructions given at his original trial. Our review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

A jury convicted Jones of first-degree murder in 1996, and the court sentenced him to life in prison. On direct appeal, this court affirmed the conviction and sentence. *State v. Jones*, No. 96-0758 (Iowa Ct. App. Oct. 29, 1997). Jones subsequently filed a postconviction relief application contending his trial counsel was ineffective. Following a hearing, the district court dismissed

[1] *Heemstra* holds that where the act causing willful injury is the same act that caused the victim's death, the former merges with murder and cannot serve as a predicate felony for felony-murder purposes. 721 N.W.2d at 558.

the application. This court affirmed the dismissal. *Jones v. State*, No. 02-0854 (Iowa Ct. App. Oct. 29, 2003).

On October 2, 2007, Jones filed his second application for postconviction relief. Appointed counsel filed an amended application on Jones's behalf, and later, a second amended application. The State responded, arguing among other things, that Jones's claims were barred by the statute of limitations. In its ruling, the district court stated

> [t]hough it is likely that the Applicant's second application for postconviction relief is barred by the applicable statute of limitations contained in Iowa Code § 822.3, this Court nevertheless concludes that the Applicant's claim for postconviction relief must fail on other grounds.

The court addressed each ground raised by Jones and denied relief. Jones appeals.

To establish a claim of ineffective assistance of counsel, Jones must show by a preponderance of the evidence that (1) counsel's performance fell outside the normal range of competency and (2) the deficient performance so prejudiced the defense as to deprive the criminal defendant of a fair trial. *Thompson v. State,* 492 N.W.2d 410, 413 (Iowa 1992). We may dispose of an ineffective-assistance-of-counsel claim if the applicant fails to meet either the breach of duty or the prejudice prong. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 699 (1984). In order to show prejudice, Jones must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Prior bad acts evidence. Jones claims his trial counsel breached an essential duty in failing to object to certain prior bad acts evidence: that Jones made death threats to his own children and that Jones fired a hand gun out of a van window shortly before the killing, for no apparent reason. He asserts his direct appeal counsel, his first postconviction relief trial and appellate counsel, and his second postconviction relief trial counsel were all ineffective for failing to claim Jones's criminal trial counsel was ineffective for the breach. Jones acknowledges his second postconviction relief application was filed nearly ten years after procedendo issued in his direct appeal.

Iowa Code section 822.3 (2007) requires an application for postconviction relief be filed within three years from the date of procedendo in the event of an appeal. However, this limitation does not apply to a ground of fact or law that could not have been raised within the applicable time period. Iowa Code § 822.3. Certainly, the issue regarding prior bad acts could have been raised within the applicable time period, and Jones does not suggest otherwise.

Jones attempts to avoid preclusive effect of the statute of limitations by arguing application of the sufficient-reason exception contained in section 822.8. That section provides that all grounds for relief available to the applicant must be raised in the applicant's original, supplemental, or amended application. *Id.* § 822.8. Any ground not raised "may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplement, or amended application." *Id.* Jones notes that ineffective assistance of counsel may constitute sufficient reason to permit issues to be raised for the first time in a

postconviction relief proceeding. *See Collins v. State*, 588 N.W.2d 399, 402-03 (Iowa 1998). Without specifically saying so, Jones concludes ineffective assistance of counsel excuses the filing of his second application for postconviction relief outside the three-year statute of limitations. Jones's reasoning is flawed.

The language of section 822.8 "presumes a timely filed application for postconviction relief." *Wilkins v. State*, 522 N.W.2d 821, 824 (Iowa 1994). Jones's second application for postconviction relief was not timely filed, being outside the three-year statute of limitations of section 822.3. A claim of ineffective assistance of counsel does not constitute a claim that "could not have been raised within the applicable time period" of section 822.3. *Whitsel v. State*, 525 N.W.2d 860, 864 (Iowa 1994). Jones's claim of ineffective assistance of counsel is barred by section 822.3 and therefore fails.

Jury instructions. In his pro se appellate brief, Jones claims the criminal trial court erred in the submission of certain jury instructions. Postconviction relief proceedings are not an alternative means for litigating issues that should have been properly presented for review on direct appeal. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). Any claim not properly raised on direct appeal may not be litigated in a postconviction relief action unless sufficient reason or cause is shown. *Id.* Jones's jury instruction issues could have been raised in his direct appeal, and he neither argues nor presents any sufficient reason or cause for not doing so. Jones does not assert ineffective assistance of counsel as sufficient reason or cause, but even if he did, his claims do not fall within any

exception to the applicable statute of limitations and are therefore barred. Iowa Code § 822.3.

Violation of due process rights for failure to apply *Heemstra* retroactively. In his pro se appellate brief, Jones claims the failure to apply *Heemstra* retroactively to his case violates his federal and state due process rights.[2] The federal and state Due Process Clauses are nearly identical in scope, import, and purpose. *State v. Hernandez-Lopez*, 639 N.W.2d 226, 237 (Iowa 2002). Jones makes no argument that we should employ a different analysis under the Iowa Constitution, so his due process claim is subject to using the same analysis to interpret the Iowa Constitution and the Federal Constitution. *See State v. Dudley*, 766 N.W.2d 606, 624 (Iowa 2009).

The federal due process argument was recently rejected by our supreme court, which held that its refusal to apply Heemstra retroactively did not violate federal due process. *Goosman*, 764 N.W.2d at 545. There is no reason to deviate from the *Goosman* federal due process analysis in considering Jones's state constitutional due process claim. We thus conclude Jones's state and federal due process rights were not violated by the refusal to apply *Heemstra* retroactively to his case.

Ineffective assistance of counsel for failure to argue *Heemstra* should apply retroactively under theories of equal protection and

[2] Jones argued in his application that limiting the retrospective application of the *Heemstra* decision violated his "constitutional rights." Hearing on Jones's application was held on November 12, 2008. The court's order, finding "Iowa's appellate courts have been clear in articulating that a failure to retroactively apply *Heemstra* to cases resolved on direct appeal is neither erroneous nor violative of an Applicant's constitutional rights," was issued January 2, 2009. The *Goosman* decision, holding the limitation of retroactivity announced in *Heemstra* did not violate federal due process, was issued April 17, 2009. *Goosman v. State*, 764 N.W.2d 539, 545 (Iowa 2009).

separation of powers. Jones argues his trial counsel was ineffective for failing to object to the jury instruction regarding felony-murder, and that his direct appeal counsel and first postconviction relief counsel were ineffective for failing to raise the issue of trial counsel's breach. Further, Jones asserts his second postconviction counsel was ineffective in failing to make equal protection and separation of powers arguments regarding the retroactivity of *Heemstra*.[3]

In arguing that all of his attorneys were ineffective, Jones does not address the applicable statute of limitations, but we assume he takes the same position as he did in his argument regarding prior bad acts. As noted above, section 822.3 requires an application for postconviction relief to be filed within three years of the date of procedendo in the event of an appeal. Jones did not file his second application for postconviction relief until October 2007, almost seven years after the limitations period expired. For the same reasons we rejected his argument concerning the application of section 822.8 regarding the issue of prior bad acts, we find Jones's ineffective-assistance-of-counsel claims do not excuse the filing of his second application for postconviction relief outside the three-year statute of limitations. *See Wilkins*, 522 N.W.2d at 824.

The exception in section 822.3 for "ground[s] of fact or law that could not have been raised within the applicable time period" is also of no help to Jones, even had he made such an argument. "[T]he objective of the escape clause of section 822.3 is to provide relief from the limitation period when an applicant had

[3] Because the applicant in *Goosman* did not raise equal protection and separation of powers in his application for postconviction relief, and the district court did not rule upon the issues, the supreme court declined to address those issues. 764 N.W.2d at 545. Thus, resolution of the merits of those issues remains for another day, but not today as we find Jones's claim time-barred by the operation of section 822.3.

'no opportunity' to assert the claim before the limitation period expired." *Cornell v. State*, 529 N.W.2d 606, 611 (Iowa Ct. App. 1994). The "statute compels the conclusion that exceptions to the time bar would be, for example, newly-discovered evidence or a ground that the applicant was at least not alerted to in some way." *Wilkins,* 522 N.W.2d at 824.

The rule that allowed the use of willful injury as a predicate felony for felony-murder purposes began with *State v. Beeman*, 315 N.W.2d 770, 776-77 (Iowa 1982). Prior to Jones's 1996 conviction, the validity of the rule was criticized and litigated. *See Heemstra*, 721 N.W.2d at 554-58. Jones could have done the same during his criminal trial, on direct appeal, or by timely application for postconviction relief, but he did not, nor does he now argue he had no opportunity to do so. The legal and factual underpinnings of Jones's claims were in existence during the three-year period and were available to be addressed in Jones's appellate and postconviction proceedings. Accordingly, we conclude Jones's claims that his trial counsel was ineffective for failing to object to the jury instruction regarding felony-murder, and that his direct appeal counsel and first postconviction relief counsel were ineffective for failing to raise the issue of trial counsel's breach, and that his second postconviction relief counsel was ineffective in failing to make equal protection and separation of powers arguments regarding the retroactivity of *Heemstra*, are all time-barred under section 822.3.

Conclusion. For all the above reasons, we affirm the district court's denial of Jones's application for postconviction relief. *See DeVoss v. State*, 648

N.W.2d 56, 62 (Iowa 2002) (stating we may affirm a district court ruling on a proper ground urged by the successful party but not relied upon by the court).

AFFIRMED.